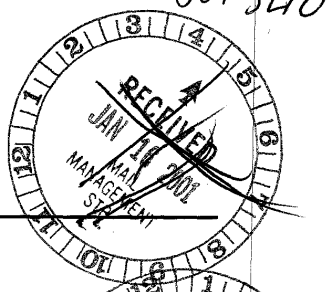
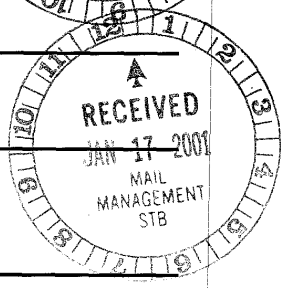


Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

Ex Parte 582 (Sub-No.1)

MAJOR RAIL CONSOLIDATION PROCEDURES



**REBUTTAL COMMENTS OF
MARYLAND DEPARTMENT OF TRANSPORTATION**

The Maryland Department of Transportation ("MDOT") hereby submits its Rebuttal Comments with respect to the revised railroad merger procedures set forth in the Notice of Proposed Rulemaking dated October 3, 2000 (the "NPRM").[1] MDOT, in initial Comments (filed jointly by the Maryland Mass Transit Administration on behalf of MARC Rail Service with the Southern California Regional Rail Authority) and Reply Comments has expressed it views about those proposed rules. The purpose of this Rebuttal is to clarify the record with respect to other parties' misstatements either of facts or of the positions MDOT or MTA has articulated in this proceeding.

1. CSX states in its Reply (at p. 69) that " . . . the circumstance of a merger between two freight railroads does not warrant any change in the fundamental relationship between freight railroads and passenger rail agencies." This is not always the case. CSX asks the Board to make an assumption that too often is not borne out by the facts. In fact, the agreed upon relationship between the parties changes enormously as a result of a merger.

[1] These Rebuttal Comments were due on January 11, 2001. MDOT has today filed a Motion for Leave to File Rebuttal Comments Out of Time, and is submitting these Rebuttal Comments in anticipation of a favorable ruling.

Each contract for shared use between a commuter operator and a freight railroad begins with an understanding of what the respective operations of each will be. The agreements include commitments for service reliability and operating characteristics based on information each party has received from the other about their projected volumes and frequencies. In most cases, the public agencies make investments in the infrastructure that improve service for both freight and passenger operations. Often, the parties include projections of changes in traffic levels or train frequencies. These projections can lead the parties to agree prior to the start of operations on infrastructure improvements that will be needed in the future if those frequencies or traffic levels arrive.

When mergers take place, as the operating plans and density charts that are an essential element of each application often show, the freight carrier makes plans to change its side of those projections. In many cases, those changes may adversely affect its ability to fulfill its obligations to the commuter carrier with respect to operating windows or service reliability. The freight railroad, not the commuter operation, has fundamentally changed the scenario. Too often that same railroad then attempts to use this Board's approval of its transaction as a shield to protect it from allegations that its change to the deal should cause it to bear the cost of infrastructure improvements necessary to restore the *status quo* to which the parties had agreed at the outset.[2]

The Association of American Railroads ("AAR") objects, at p. 18 of its Reply Comments, to the proposal that "merging railroads be required to make improvements in the railroad infrastructure for the benefit of commuter railroads". Like CSX, the AAR attempts to

[2] In these circumstances, and contrary to the suggestion of Norfolk Southern in its Reply Comments (at page 51) it is the freight railroad and not the commuter carrier that is attempting to rewrite the contractual commitments made by the parties.

make the request of MARC and SCRRA something that it is not. CSX, AAR and others misapprehend the request these commuter railroads are presenting. The commuters want the benefit of their bargain. When the railroads change the playing field, they and not the public agencies should bear the burden of repairing it to its former condition. The commuter carriers seek fairness.

It is a fundamental tenet of contract law that when one party elects to not fulfill its part of an agreement, for whatever reason, that party is in breach.[3] Typically, the courts will provide a remedy that is designed either to order the non-performing party to perform or to repay the party for its losses from the breach, restoring the injured party to the position upon which it initially agreed. Here, however, there is a potential problem if a commuter railroad that is not getting what it bargained for brings arbitration or a court action. In that proceeding, it may well face an argument from the offending railroad that the tribunal has no ability to remedy the breach because the STB's approval of the transaction at issue immunizes the carrier from the application of all other law as necessary to implement their transaction. 49 U.S.C. §11321(a). Refusal by the Board to condition its approval on remedies that will address issues raised by the commuter authorities that are legitimately caused by the transaction puts the commuters in a position where:

(a) the Board, which has plenary jurisdiction over the freight railroads and the merger transactions that are the subject of this rulemaking proceeding (49 U.S.C. §10501(c) and §11324) will not address the adverse impacts created by the fundamental change in the contractual relationship that is effected by the merger; and

[3] "When performance of a duty under a contract is due any non-performance is a breach." *Restatement (Second) of Contracts*, §235(2), 1981.

(b) the court or an arbitrator may conclude (whether properly or not) that the broad preemption clause in the statute permits the railroad to change at will its obligations under the contract as long as it can make a showing that the change is necessary to carry out the terms of an approved transaction.

In short, the Board's refusal to acknowledge the impact of mergers on the ability of freight railroads to fulfill their obligations under agreements with passenger operators and to condition the approval of transactions on a requirement that the freights fulfill those obligations could leave the public with no remedy whatsoever. Such a result would clearly not be consistent with the "public interest" standard that guides the Board's review of these transactions. 49 U.S.C. §11324.

2. CSX mischaracterizes the nature of the presumption that MARC and SCRRA have requested the Board to include in the revised regulations. In their initial joint comments MARC and SCRRA asked the Board to presume that commuter rail services are essential. This is materially different from the description CSX provides at p. 71, where it states that "there should be no general presumption that the preservation of passenger rail service takes precedence over freight rail services or other public interest considerations." If that were the request that MARC and SCRRA were presenting, the debate would be different. But, it is not. Rather, MARC and SCRRA ask the Board to presume that the services that commuter rail operators provide is "essential" within the meaning of 49 C.F.R. §1180.1(c)(2)(ii). Then, if the proposed merger will have some impact on that service, appropriate conditions will be imposed to protect against the denigration of that service.[4] This is materially different from the request CSX

[4] Contrary to Norfolk Southern's statement at page 50 of its Reply Comments, MARC and SCRRA do not seek protective conditions "even in the absence of any proper showing under the "essential services" standard." The Board should approve such conditions only upon a showing that the proposed transaction will provide an adverse effect that the proposed conditions are designed to address.

opposes. MARC's and SCRRA's requested change to the regulations is reasonable and should be granted.

3. CSX's and Norfolk Southern's justification for their opposition to changing the arrangements that led to the creation of short lines (*see* CSX Reply Comments at 45; Norfolk Southern Reply Comments at 27 - 28) has the same fatal flaw as the argument with respect to conditions to protect the commuter railroads that may lead to a modification of rights and obligations of the commuter rail agreements (see item #1, above). That is, the sale transactions that led to the creation of the short lines, including the agreement to limitations on commercial relationships (so-called "paper barriers") were based on certain fundamental assumptions. When one party to that deal unilaterally undertakes changes that equally fundamentally affect the parties' relationship, that party should not be permitted to piously cite to the original agreement and hide behind this Board's approval of the merger transaction as it proceeds to seriously threaten the short line's commercial viability.

CONCLUSION

There is no doubt, as MDOT has stated in its comments previously filed in this proceeding, that there is some merit to the STB's decision to effect a sea-change in the way it will look at future mergers. As the regulatory agency with the mandate to safeguard the public interest when it is reviewing and deciding whether to approve a proposed merger, this Board must adopt the changes that MDOT (or MTA on behalf of MARC Train Service) has proposed throughout this proceeding. Both commuter operators and short lines potentially face transactions in which their operating and commercial arrangements with a merging railroad are fundamentally changed. Without the protection of their interests that MDOT and others have requested throughout this proceeding, the interests of the public will be trampled, not protected.

WHEREFORE, and in view of all of the foregoing, and for all of the reasons presented by MDOT in the initial Comments, the Reply Comments and this Rebuttal, the changes proposed by MDOT and MTA (on behalf of MARC Train Service) should be approved.

Dated: January 16, 2001

Respectfully submitted,

Charles A. Spitulnik
McLeod, Watkinson & Miller
One Massachusetts Avenue, N.W.
Suite 800
Washington, D.C. 20001
(202) 842-2345
Counsel for the Maryland
Department of Transportation

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2001, a copy of the Rebuttal Comments of Maryland Department of Transportation was served by first class mail, postage pre-paid upon all Parties of Record.

Charles A. Spitulnik

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